

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2605

PETITION OF FRANCIS AND MARIA ROMERO

OPINION OF THE BOARD

(Opinion Adopted October 20, 2004)

(Effective Date of Opinion: November 24, 2004)

Case No. S-2605 is an application for a special exception pursuant to Section 59-G-2.30.00 (Landscape Contractor) of the Zoning Ordinance to permit the operation of a landscape contracting business. The Hearing Examiner for Montgomery County held a hearing on the application on August 11, 2004, and on September 28, 2004, issued a Report and Recommendation for approval of the special exception.

The subject property is 2.3 acres, located at 14680 Sugarland Road, Poolsville, Maryland, 20837, in the RDT Zone.

Decision of the Board: Special Exception Granted subject
to the conditions enumerated below.

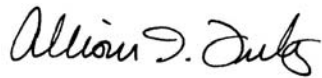
The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on October 20, 2004. After careful review of the record, the Board adopts the Report and Recommendation and grants the special exception subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witness and representations of counsel identified in this report, including the final Special Exception Site Plan, Exhibit 21.
2. The hours of operation for the landscape contractor business shall be from 6:30 a.m. to 7:30 p.m. Monday through Friday and 7:30 a.m. to 2:00 p.m. on Saturdays. Expanded hours are permitted as needed in the event of a weather emergency such as a large snowfall or a hurricane.
3. No sale of goods of any kind may take place on the subject property.

4. The landscape contractor business is limited to eight employees on site at any one time, in addition to the Petitioner, except that up to 12 employees may be on site at one time for special clean-up or winter preparation activities, for no more than a total of four full or partial days per year. No more than six employee vehicles may be parked on site at any one time, and all must be parked in the area designated on the site plan for employee parking.
5. Vehicles, trailers and heavy equipment stored on the subject property in connection with the landscape contractor business shall be limited to a total of 12 registered vehicles, comprised of trucks and landscaping trailers, plus one tractor-loader or skid-steer loader and the Petitioners' personal pick-up truck. No more than eight of the registered vehicles may be trucks, and trucks may not exceed a gross vehicle weight of 10,000 pounds.
6. All business vehicles shall be parked in the area designated on the site plan, or stored inside one of the barns.
7. No signage is permitted.
8. Activities taking place on site must be limited to those described in the Petitioners' testimony and written evidence, consisting primarily of employees loading equipment and materials on trucks in the morning and unloading them in the late afternoon. Activities taking place between those times must be limited to accepting deliveries and other minor, incidental activities related to the landscape contractor business.
9. The landscape contractor business may receive no more than three deliveries per week. Deliveries to the subject property in connection with the special exception shall take place only between the hours of 8:00 a.m. and 6:00 p.m., Monday through Friday. No deliveries shall take place on Saturdays or Sundays. Delivery of bulk landscaping materials may not be received unless and until appropriate bins are constructed in the area designated for plant and bulk material storage on the site plan, Exhibit 21.
10. The special exception holder must request permission from the Board in order to transfer the special exception to a corporation.

On a motion by Louise L. Mayer, seconded by Wendell M. Holloway, with Donna L. Barron, Angelo M. Caputo and Allison Ishihara Fultz, Chair, in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 24th day of November, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
PETITION OF FRANCIS R. ROMERO

Petitioner
No. S-2605
36) Board of Appeals Case
(OZAH Referral No. 04-

Alfred Blumberg
Francis R. Romero
Maria Romero

In Support of the Petition

William J. Roberts, Esquire

Attorney for the Petitioner

* * * * *

Martin Klauber, Esquire

People's Counsel

In Support of the Petition

* * * * *

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition S-2605, filed on January 29, 2004, requests a special exception under the RDT Zone to operate a landscape contractor business on property located at 14680 Sugarland Road in Poolesville, Maryland. Technical Staff of the Maryland-National Capital Park & Planning Commission ("MNCPPC") reviewed the petition and, in a report dated July 23, 2004, recommended *approval* with conditions.¹ See Ex. 15. Technical Staff provided further information, at the Hearing Examiner's request, in supplemental reports dated August 10, 2004 (Ex. 16) and August 17, 2004 (Ex. 25). The Montgomery County Planning Board ("Planning Board") reviewed the petition on Thursday, July 29, 2004 and voted 5 to 0 to recommend *approval* with conditions. See Ex. 13.

On March 18, 2004 the Board of Appeals ("BOA") scheduled a public hearing in this matter for June 21, 2004, to be conducted by the Office of Zoning and Administrative Hearings. See Ex. 9. By notice dated June 8, 2004 the hearing was postponed, for administrative reasons, to August 11, 2004.² The public hearing was convened on August 11, 2004, at which time testimony and evidence were received in support of the petition. No testimony was offered in opposition to the special exception, and no opposition is reflected in the record. The record was held open for the receipt of supplemental submissions by the Petitioner and Technical Staff, and closed on August 25, 2004.

II. BACKGROUND

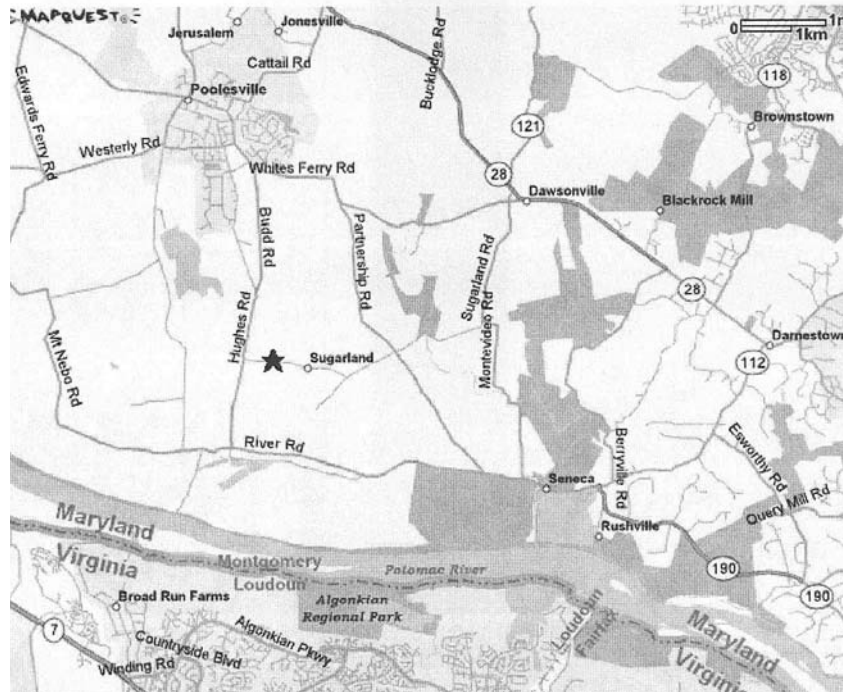
A. Subject Property and Neighborhood

The subject property contains approximately 2.3 acres of land located at 14680 Sugarland Road, just south of the town of Poolesville, Maryland. The site is on the north side of Sugarland Road, about 6,000 feet (slightly over a mile) from Sugarland Lane on the east and approximately 2,000 feet (just under half a mile) from Hughes Road on the west. It is classified under the RDT Zone. The general location of the site may be seen on the map below, which the Hearing Examiner obtained from the on-line service Mapquest.³

¹ The Staff Report is liberally paraphrased in Part II of this report.

² After inquiries by the Petitioner about the status of Technical Staff review, staff at the MNCPPC, BOA and OZAH discovered, approximately one month before the original June 21 hearing date, that the copy of the case materials intended for Technical Staff had been misplaced or lost in transit. A new set of materials was provided immediately, but a delay in the hearing was necessary to allow time for Technical Staff and Planning Board review.

³ The Petitioner and Technical Staff supplied vicinity maps, but the normal 2,000-foot radius is not very informative in a rural, sparsely developed area like Poolesville.



The subject property is developed with a two-story, wood paneled, single-family residence, two large barns associated with the landscape contractor use, and a roofed shelter, playground area, storage shed and chicken coop/yard associated with the residential use. The residence is not used for any purpose connected with the landscape contractor use except occasional employee use of bathrooms. An area designated for storage of plants and bulk landscaping materials is located behind the barns. A gravel driveway located east of the residence leads from Sugarland Road to a residential parking area adjacent to the residence. A second, wider gravel driveway, located west of the residence, leads from Sugarland Road to an employee parking area located in the side yard. The west drive also leads, through a double gate, to the main special exception operation area behind the house. The two driveways are separated by a 140-foot landscaped lawn.

An opaque, six-foot wooden fence encloses the rear portion of the property on the east and west sides, separating and screening all of the special exception operations except employee parking from the neighbors to the east and west. To the north, the property has a farm fence (split rail and wire) and opens onto a large agricultural field that is part of a 122-acre farm. To the south, the active business area of the property is screened from Sugarland Road by a series of fences, structures and plantings that stretch across the site, dividing the front of the house from the main special exception operations area: an opaque, six-foot wooden fence that runs from beyond the eastern property line to east side of the house; the house itself; an opaque, six-foot wooden fence that runs from the west side of the house to the edge of a barn, with a double gate abutting the barn; part of the barn; and dense, mature vegetation that extends from the barn to the western property line. Thus, as seen from Sugarland Road, the property has retained its rural residential appearance despite the business operations taking place behind the house.

The photographs below depict various areas of the subject property.

Subject Property As Seen from Sugarland Road, Ex. 8(a)



Employee Parking Area, Excerpted from Staff Report



Rear of Residence with Covered Patio, Ex. 8(f)



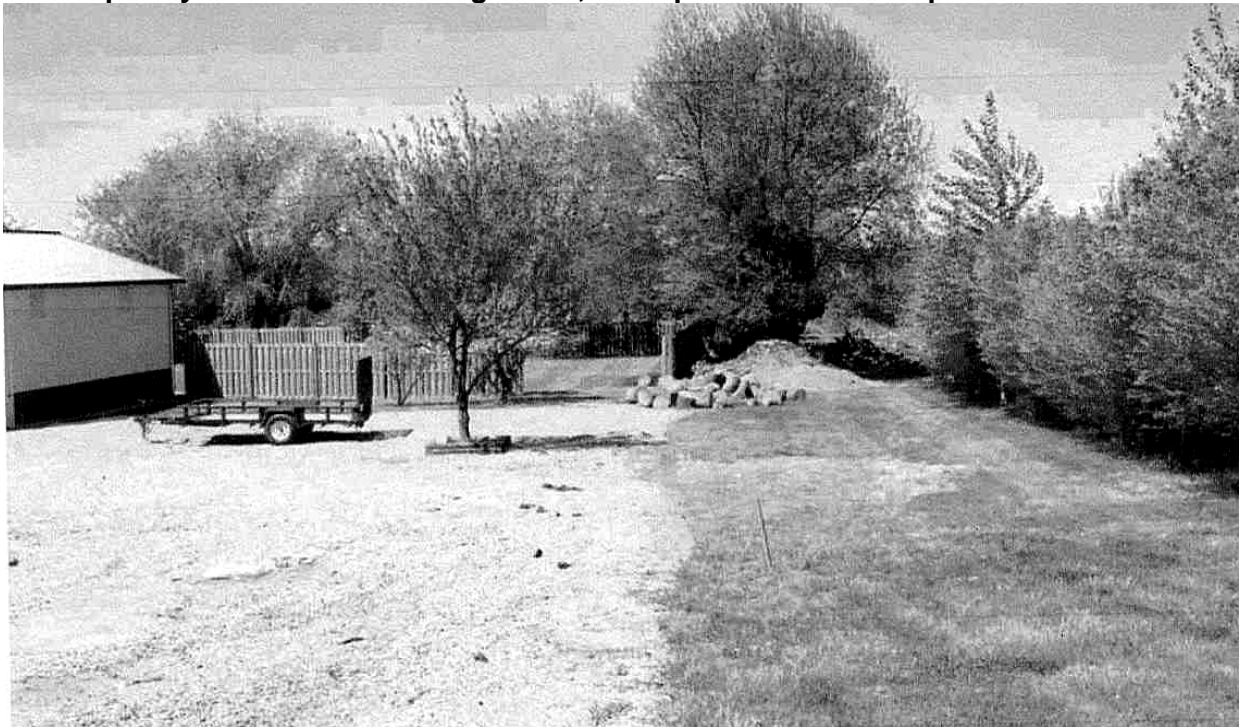
Truck and Trailer Parking Behind House, Looking North, Ex. 8(h)



Barns, Looking from East to West, Ex. 8(g)



Temporary Bulk Material Storage Area, Excerpted from Staff Report



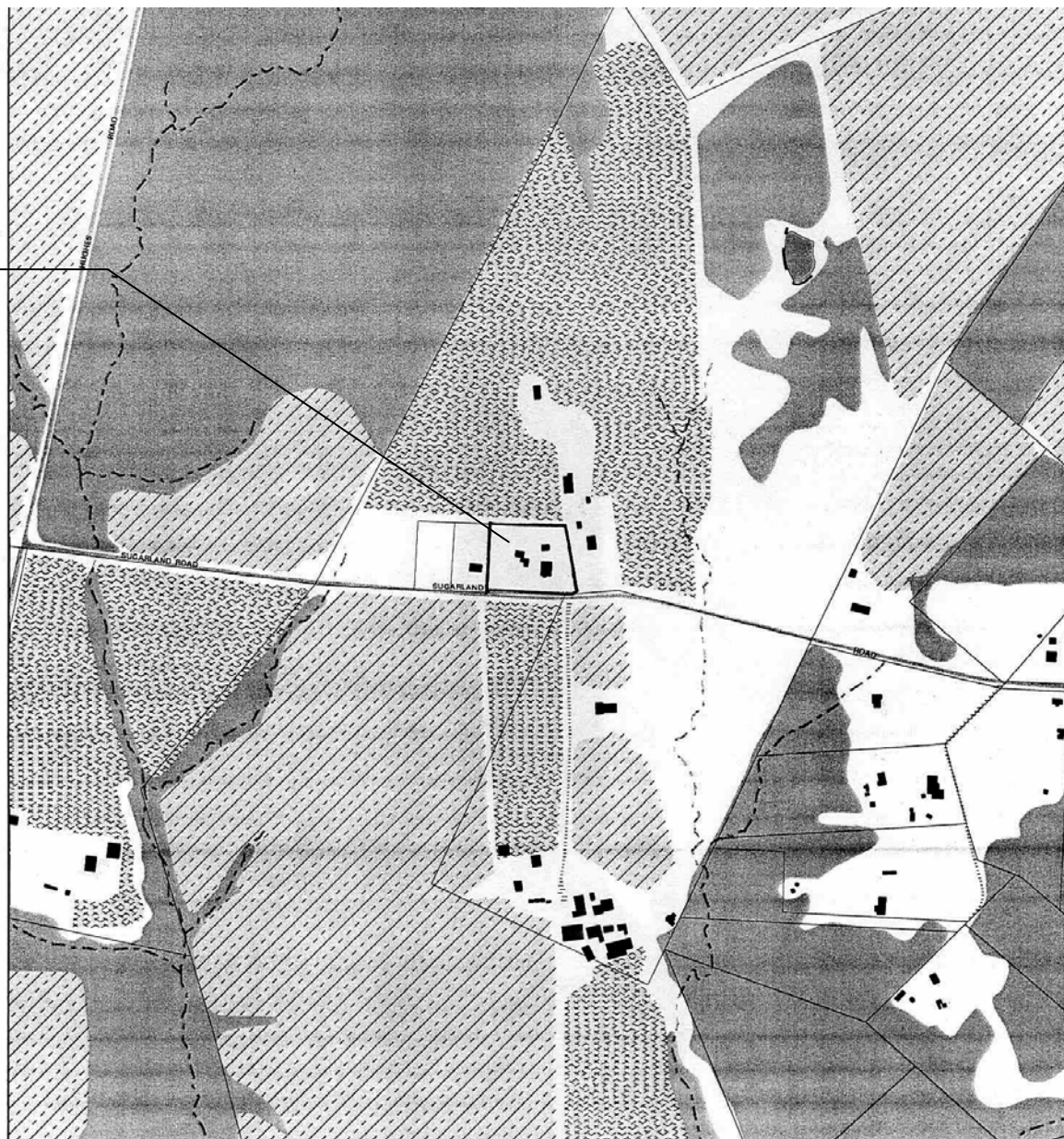
The subject property is well-landscaped, with a row of Leyland cypress trees along Sugarland Road, decorative plantings along the front walk, and several trees including a 28-inch maple in the northwest corner of the site. The northeast corner of

the property, closest to the location of an existing house that belongs to the neighboring farm, is heavily landscaped with deciduous and evergreen plantings.

The general neighborhood for purposes of evaluating a special exception should include the geographic area that is within sight of the subject property or reasonably could be expected to be affected by the proposed use. Technical Staff limited its discussion of the neighborhood to the properties abutting the subject property, which appears to be an appropriate neighborhood definition in a rural area like Sugarland Road. All of the surrounding properties are classified under the RDT Zone, and most, including those to the north, east and south, are in agricultural use. Abutting to the west is a single-family residence in the RDT Zone, which the Petitioners' planner described as the only other house fronting right on Sugarland Road for quite some distance. Tr. at 23. An area classified under the R-200 Zone is located a short distance to the east. However, as the vicinity map reproduced below demonstrates, the general neighborhood of the subject property remains primarily agricultural, with some rural residential uses. The area also contains scattered special exception uses, including a kennel that may or may not be in active use, and riding stables.

Vicinity Map, Excerpted from Staff Report (Ex. 15)

Subject
Property



The photographs on the following pages provide various views of the distances and screening that buffer neighboring properties from the impacts of the proposed use.

View from Subject Property to Confronting Property to South, Ex. 8(b)



View from Subject Property to Adjoining Property to East, Ex. 8(c)



View from Subject Property to Adjoining Property to North, Ex. 8(d)



View from Subject Property to Adjoining Property to West, Ex. 8(e)



B. Proposed Use

The Petitioners immigrated to the United States from their native El Salvador in 1983, working as piecemeal vegetable pickers in Florida. They moved to Montgomery County in 1989 and have since become American citizens and bought a small house in Rockville. Mr. Romero started his landscaping business as a one-man lawn-mowing operation and it has grown to a business with five trucks and several employees. The business operated from the Romeros' home, plus rented warehouse space, until 2002, when the Romeros purchased the subject property to have a better staging ground for the landscaping operation. Mr. Romero mentioned the purchase to one of his clients, who happens to be an attorney, and the client told him that he probably needed a special exception to operate a business on the property. The Romeros then sought the advice of counsel on how to obtain a special exception. They have operated for two years without receiving a violation notice from the County, nor have they received any complaints from neighbors. Nonetheless, they felt it was important to follow the law, and therefore filed the present petition.

The Romeros propose to continue conducting a landscape contracting business on the subject property. The Zoning Ordinance defines "landscape contractor" in relevant part as follows:

The business of designing, installing, planting or maintaining lawns, gardens, or other landscaping and snow removal services, including tree installation, maintenance or removal, at off-site locations with vehicles, equipment, and supplies that are stored, parked, serviced, or loaded at the business location.

Mr. Romero currently has eight employees, four single-axle stake body trucks and four single-axle equipment trailers. He also sometimes parks his personal pick-up truck in the business area of the site. During the peak Spring-Fall season, he operates from 6:30 a.m. to 7:30 p.m. Monday through Friday, and 7:30 a.m. to 2:00 p.m. on Saturdays. During the winter months, his operation is limited to snow removal services. Mr. Romero's business focuses on off-site landscape maintenance, such as lawn mowing and leaf removal. Typically, the only employees who come to the subject property are the ones who drive the four trucks. The other employees are picked up closer to the job sites. The trucks and trailers are parked in the areas indicated on the site plan, east of the barns and behind the existing house. All other equipment, such as mowers, leaf blowers and trimmers, is stored mostly inside the barns, although it may sometimes be stored on the trailers overnight. In general, Mr. Romero's employees load bulk landscaping materials onto the trucks at the place of purchase, and bulk materials are not stored at the subject property. In some instances, leftover materials from a job site, such as topsoil, mulch, pavers, timbers or firewood, may be stored on the subject property temporarily, as seen in the photograph on page 8 of this report. The bulk material storage area is identified on the site plan, and is located north and west of the barns. It is within a fenced area and is not readily visible from surrounding properties.

Although Mr. Romero's business currently does not involve large-scale landscape installation, he would like to preserve the possibility of offering such services in the future. He also envisions the possibility that his business may grow. Accordingly, he seeks permission to increase the number of vehicles stored on site to a total of 12, not counting his personal pick-up truck. The Petitioners' original Statement of Operations, Ex. 3, requested approval for up to six stake body trucks and six trailers. The revised Statement of Operations requests approval for "a total of twelve (12) registered vehicles, including trucks and trailers or any combination of each." Ex. 26(a)

at 4-5. The change from requesting an equal number of trucks and trailers to requesting a total number of vehicles, without limiting the number of trucks, was an unexpected post-hearing revision to the Statement of Operations, and was not discussed at the hearing. Technical Staff's recommendation of approval was based specifically on six trucks and six trailers. See Ex. 15 at 6. Moreover, the testimony suggested that the Petitioners intended, at the time of the hearing, to seek permission for a maximum of six trucks and six trailers, not "some combination" of trucks and trailers totaling 12. See, e.g., Tr. at 45-46.

The Hearing Examiner considers this to be a substantive change, because it affects the number of employees who would be on site on a regular basis, as well as the general size and scope of the operation. With six trucks and six trailers, the business would rarely have more than six employees on site at one time. Six trucks would load and leave in the morning, and six trucks would return and unload in the evening. If the business is permitted to have as many as 12 trucks, which could have a capacity and configuration that allows them to carry equipment and material without the use of a trailer, the level of activity on site could increase to 12 employees arriving on a daily basis, with 12 trucks and loading and leaving in the morning, and the same 12 returning and unloading in the evening – double the level of activity and number of trips currently anticipated. Accordingly, the conditions of approval recommended at the conclusion of this report include a limitation on the number of vehicles that specifies a total of 12 registered vehicles, with no more than eight trucks, and no truck exceeding the size of the Petitioners' current trucks – 10,000 pounds gross vehicle weight. The eight-truck limit is intended to give the Petitioners some flexibility while controlling the overall activity level on site.

The Petitioners request permission to have as many as 12 employees on site at one time for occasional needs such as preparing the site and equipment for winter. During the hearing, Mr. Romero's testimony indicated that having 12 employees on site would be a rare event, not even necessarily an annual occurrence. As a result, the undersigned stated during the hearing that a condition specific to this issue did not appear to be necessary. However, in light of the request in the revised Statement of Operations for as many as 12 trucks, the Hearing Examiner believes it would be prudent to place a specific limit on the number of employees on site. Accordingly, the recommended conditions of approval specify that no more than eight employees may be on site at any one time, except that up to 12 employees may be on site for special clean-up or winter preparation activities, for no more than a total of four full or partial days per year.

The Petitioners also seek approval to store on site one tractor-loader or skid-steer loader, which would be used to handle plants and bulk materials if the business expands to include landscape installation. This equipment would be stored inside one of the existing barns when not in use. If the business expands to include landscape installation work, the Petitioners will also need to receive deliveries of plants and bulk materials at the subject property. They have agreed to limit such deliveries to no more than three per week. The undersigned additionally recommends limiting the days and times of such deliveries, as specified in the recommended conditions of

approval, to reduce potential neighborhood impacts. Such materials would be stored in the area designated on the site plan for plant and bulk material storage, and would not be accepted until the Petitioners have erected "appropriate walls, bins or barriers to separate such bulk materials in that area." Revised Statement of Operations, Ex. 26(a), at 6. Technical Staff finds that three deliveries per week during normal business hours would be acceptable, and recommends that the Petitioners use bins or other non-permanent structures, which would not require the issuance of a building permit. See Ex. 25. The recommended conditions of approval track Staff's recommendation.

In addition to the regular hours of operation, the Petitioners seek to operate outside normal hours, including on Sunday, in the event of a weather emergency such as a large snowfall or a hurricane. The Planning Board recommended approval of this request, which is reflected in the recommended conditions of approval at the close of this report.

The Petitioners do not propose any physical changes to the site, with the exception of a minor change related to employee parking, discussed in Part II.F below. The proposed site plan is reproduced on the next page. The "Site Data" table, which includes the notation made during the hearing, "Bins to be added only if materials are delivered to site," is provided below.

Special Exception Site Plan, Ex. 21

C. Master Plan

The subject property is in the area covered by the *Preservation of Agriculture and Rural Open Space Master Plan* (the "Master Plan"), approved and adopted in 1980 and amended in 1986. Technical Staff states that the Master Plan supports the existing RDT zoning classification on the subject property, which permits landscape contractor uses by special exception. Moreover, the proposed use would maintain the agricultural and rural character of the general neighborhood. Accordingly, Staff opines that the use would be consistent with the Master Plan. See Ex. 15 at 4.

D. Lighting and Noise

The Statement of Operations indicates that the Petitioners do not propose any exterior lighting other than existing lighting used in connection with the residence on the subject property. See Ex. 26(a) at 7. However, the submitted lighting plan and the testimony of the Petitioners' planner indicate that in addition to lighting on and around the residence, floodlights are installed in areas principally devoted to the landscape contractor use. Even this lighting, however, consists of fixtures that are residential in nature. Moreover, the floodlights are controlled by motion sensors, and are not left on all night. Technical Staff did not analyze site lighting in any detail, although the Staff Report includes a conclusion that the existing lighting fixtures on the barns and surrounding the residence do not have adverse impacts on adjacent properties related to glare, light trespass or sky glow. The Petitioners' planner provided a similar opinion. The lighting plan is reproduced on the next page.

With regard to noise, Technical Staff states that noise is not as great a concern in a rural, RDT Zone location, where noises from farming equipment and animals are part of the preferred use in the zone, as they might be in a more traditional residential neighborhood. See Ex. 18. As a result, Staff finds the current and proposed operating hours, starting at 6:30 a.m., to be an inherent operating condition and not a cause for concern. The Hearing Examiner observes that although, as Staff noted, a landscape contracting business is less noisy if it does not have an associated nursery or mulch manufacturing operation, noise impacts during landscape contractor loading and unloading

Lighting Plan, Ex. 23

operations typically include vehicle engines, the noise of vehicles moving on gravel surfaces, vehicle back-up alarms and voices. Nonetheless, testimony at the hearing suggests that at the subject location, surrounding farms are up and running at 6:30 a.m. and noise from the subject property does not cause any disturbance.

E. Utilities, Stormwater Management and Environmental

The subject property is served by a septic system. Technical Staff stated in a supplemental report that because employees spend little time at the site, the septic system would not be unduly taxed. See Ex. 16. The Petitioners' land planner concurred with this conclusion, noting that the major water uses that affect septic system capacity are cooking, bathing, washing dishes and washing laundry, none of which are affected by the landscape contractor operation.

The subject property contains no streams, stream valley buffers or forest, and the proposed special exception is exempt from forest conservation requirements. See Ex. 6. The site is not located within a Special Protection Area or a watershed primary management area. Neither a tree save plan nor a stormwater management plan is required, given that no physical changes to the site are proposed.

F. Parking and Traffic

The Zoning Ordinance does not prescribe specific parking requirements for a landscape contractor operation. Section 59-G-2.30.00, however, requires that all on-site operations be located at least 50 feet from any property line. This has been interpreted to include employee parking as well as truck and trailer parking.

Technical Staff notes that presently, five angled parking spaces are delineated with timber edging in the employee parking area. Staff recommends that this parking area be reconfigured to satisfy the 50-foot setback requirement, and that the area accommodate only five vehicles. This would require employees to carpool if more than five employees are on site at any one time. The Planning Board recommended that up to six vehicles be permitted to park in this area, consistent with the Petitioners' request. The Petitioners' land planner testified that the employee parking area can be reconfigured to make the spaces perpendicular to the driveway, rather than angled, which would permit the parking area to be reduced in size and pulled back the full 50 feet from the property line, while still providing six spaces. A revised site plan shows the proposed change in the parking area. This change also creates an opportunity for additional landscaping to screen the parking area from the street.

Technical Staff opined that the area identified for truck and trailer parking, which measures approximately 11,000 square feet, is adequate to accommodate six trucks and six trailers, plus Mr. Romero's personal pick-up truck. See Ex. 15 at 6, Ex. 16 at 3. Staff was not asked to consider the adequacy of parking for 12 vehicles with "some combination" of trucks and trailers. Having reviewed the site plan, the testimony, and the reports from Technical Staff, the undersigned concludes that the area designated for truck and trailer parking is adequate to accommodate the vehicles specified in the recommended conditions of approval (a total of 12 registered vehicles, including up to eight trucks with a maximum gross vehicle weight of 10,000 pounds, plus Mr. Romero's personal pick-up truck).

The parking area on the east side of the residence has enough space for at least four vehicles, two more spaces than are required for a single-family dwelling. Technical Staff recommends that this area be limited to residential parking because it is located less than 50 feet from the nearest property line. This restriction is reflected on the site plan.

The proposed use typically generates no more than ten vehicle trips during the morning peak hour: four employees arriving, four trucks leaving, and possibly Mr. Romero arriving and leaving with the crew. The same trips take place during the evening peak hour in reverse. With the full complement of eight trucks recommended in the proposed conditions of approval, the use would generate no more than 18 trips: the arrival and departure of eight employees and eight trucks, plus Mr. Romero. Even if the maximum of 12 employees came to the site at one time, if all 12 drove separately (setting aside, for the moment, the limitation of six spaces in the employee parking lot), they would generate no more than 12 trips to the site in their cars and 12 trips out of the site in the trucks during the peak morning hour, with the same numbers in reverse in the evening. Mr. Romero's arrival and departure could generate two additional trips. However, even this extreme hypothetical would generate fewer than 30 vehicle trips during the morning and evening peak hours. Accordingly, no traffic study is required to satisfy Local Area Transportation Review requirements. See Staff Report, Ex. 20 at 4. Technical Staff opined that the proposed use would not have adverse impacts on the local road network, nor would the trips generated cause Sugarland Road to lose its designation as a rustic road. Staff further opined that the existing driveways and entrances are adequate to provide safe site access with the number of vehicles proposed.

G. Development Standards

Technical Staff opined that the proposed use would comply with the development standards set forth in the RDT Zone, but did not provide a detailed list or analysis of those requirements. At the Hearing Examiner's request, the Petitioners' land planner reviewed the applicable requirements at the hearing and demonstrated that the site plan satisfies each of them. The following table sets forth development standards applicable in the RDT Zone under Code § 59-C-9.4, together with relevant data from the Site Plan and testimony.

	Required	Provided
Minimum net lot area	40,000 sq. ft.	2.3 acres
Minimum lot width		
Measured along front building line	125 feet	Over 350 feet
Measured along front street line	25 feet	375 feet
Yard requirements for main building		
From street	50 feet	Approx. 90 feet
From side lot line	20 feet one side, sum of 40 feet	95 feet
From rear lot line	35 feet	50 feet
Yard requirements for an accessory building		
From front lot line or proposed street line	50 feet ⁴	Over 100 feet
From rear lot line	10 feet	Over 50 feet
Maximum lot coverage	10 percent	6 – 7 percent ⁵
Maximum building height	50 feet	25 feet

⁴ The requirement is for 50 feet or any scenic setback indicated on an approved master plan, whichever is greater. The Petitioners' land planner and counsel testified that the Master Plan applicable in this case does not apply a scenic setback to Sugarland Road. Tr. at 50.

⁵ The Petitioners' planner testified that the building coverage is approximately six percent, while the revised Statement of Operations provides a figure of seven percent. See Tr. at 51; Ex. 26(a) at 2. In either event, the statutory requirement is satisfied.

III. SUMMARY OF TESTIMONY

A. Applicant's Case

1. Opening Statement by Counsel

The Petitioners' counsel, William Roberts, described the Romeros' background and the steps that led to the present application. He stated that the Romeros came to this country from El Salvador in 1983, working as piecemeal vegetable pickers in Florida. They moved to Montgomery County in 1989 and have since become American citizens and bought a small house in Rockville. Mr. Romero started his landscaping business as a one-man lawn-mowing operation and it has grown to a business with five trucks and several employees. The business operated from the Romeros' home, plus rented warehouse space, until 2002, when the Romeros purchased the subject property to have a better staging ground for the landscaping operation. Mr. Romero mentioned the purchase to one of his clients, who happens to be an attorney, and the client told him that he probably needed a special exception to operate a business on the property. The Romeros then sought the advice of counsel on how to obtain a special exception. They have operated for two years without receiving a violation notice from the County, nor have they received any complaints from neighbors. Nonetheless, they felt it was important to follow the law, and therefore filed the present petition.

2. Alfred Blumberg, planner

Mr. Alfred Blumberg testified on the Petitioners' behalf and was designated an expert in land use planning. He stated that his firm prepared a special exception site plan and lighting plan for this case, using as a baseline a survey that was prepared in 2002. Mr. Blumberg explained that he discussed the current operation with the Romeros, and assisted them in deciding to request permission for 50 percent more trucks and employees than they currently have to allow room for growth in the business.

Mr. Blumberg identified a series of photographs of the subject property that he took last fall, in preparation for filing the present petition. He represented that the photographs continue to accurately reflect conditions on the site, which he visited the day before the hearing.

Mr. Blumberg reviewed the site plan, and in particular a concern raised by Technical Staff that the existing employee parking, located in the front portion of the site alongside one of the driveways, does not satisfy the requirement that all operations must be at least 50 feet from the property lines. Mr. Blumberg explained that currently, cars park in this gravel parking area diagonally. In looking for a way to meet the setback requirement, he discovered that if the parking spaces are perpendicular to the driveway, instead of at an angle, the parking area can be reduced in size and pulled back the full 50 feet from the property line. A revised site plan shows the proposed change in the parking area, which also creates an opportunity for additional landscape screening.

Mr. Blumberg described general existing conditions on the site, which include a house, two large barns, two gravel driveways, fencing, separate areas for residential, employee and business vehicle parking, a play area and shed associated with the residential use, and extensive landscaping. He described the surrounding area, which include two houses, one on either side of the subject property, and beyond that mostly farmland. He noted that the property is located in the western portion of the agricultural reserve, just south of the town of Poolesville.

Mr. Blumberg briefly reviewed the general and special conditions for a landscape contractor special exception and opined that the proposed use would satisfy each of those requirements, with the reconfiguration proposed for the employee parking area. He noted that the operations are very well screened and buffered by distances and landscaping, and the nature of the use is very compatible with the activities common in the agricultural reserve and in the farming community. The nearest house to the west is approximately 130 feet from the major special exception activity area, on the other side of a six-foot, opaque fence. To the east, the nearest house is approximately 115 feet from the major special exception activity area, on the other side of an opaque fence and evergreen landscaping. The six-space employee parking area is located approximately 160 feet from the closest house, and is separated from it by a grassy area, an opaque fence and an eight-foot hedge. Moreover, most of the farms in the area are already working when Mr. Romero's business starts operating at 6:30 a.m., and there have been no complaints from neighbors during the two years he has been at the site.

Mr. Blumberg opined that the proposed landscape contractor use would have no noninherent adverse effects. There are no unusual site characteristics, and the business operation is very typical for a landscape contractor. The use would also comply with the development standards for the RDT Zone and would be consistent with the Master Plan.

Mr. Blumberg noted that the only existing special exception in the vicinity is a dog kennel that was approved for 30 or more animals on a 122-acre farm adjoining the subject property to the east. At a 1992 review hearing by the Board of Appeals, the petitioner was instructed to submit a modified site plan because the kennel had not been constructed in accordance with the approved plan. The record does not reflect any such modification. The petitioner in that case still owns the property in question, but now has a mailing address in Rhode Island. The Romeros do not know whether the kennel is still operating.

With regard to potential impact on public facilities, Mr. Blumberg stated that the small number of peak hour trips generated by the proposed use would not have an adverse impact on traffic conditions, nor would those trips increase traffic to a level that would cause Sugarland Road to lose its designation as a rustic road. Mr. Blumberg stated that the property is served by a septic system that is adequate for the residents of the home and for potential morning and evening use of bathrooms by employees. He noted that the major water uses that affect septic system capacity are cooking, bathing, washing dishes and washing laundry, none of which would be affected by the special exception.

Mr. Blumberg reviewed a lighting plan, Exhibit 23, which shows the locations of residential exterior lighting and flood lights behind the house, which are on motion detectors. All of the fixtures, including the flood lights, are residential-type fixtures.

3. Francis Romero, Petitioner

Mr. Romero confirmed that he has been operating a landscape contracting business from the subject property since early 2002. He gets along well with his neighbors and has received no complaints about the business. Mr. Romero initially testified that he plans to continue his business as it currently stands, which is limited to landscape maintenance. Following questioning by the Hearing Examiner and the People's Counsel and a conference with his counsel, he clarified that he does some limited landscape maintenance work currently, and might choose to do larger installation jobs in the future. Accordingly, he proposed to revise his statement of operations to provide for on-site delivery of materials, including plant materials, no more than three

times per week. He also directed Mr. Blumberg to revise the site plan by hand to designate an area for future storage of plants and bulk landscaping materials, to be enclosed in bins. Finally, he added to the list of proposed equipment a skid loader or Bobcat (fork lift), to be acquired in the future if installation work requires it. Mr. Romero noted that this piece of equipment, like all of his equipment other than trucks and trailers, would be stored inside one of the barns.

Mr. Romero confirmed that he is comfortable having only six employee parking spaces, and he understands that if he has more than six employees coming to the site on a given day, they will need to carpool. He also confirmed, with the assistance of his wife as a translator, that normally the only employees who come to the subject property are the ones who drive the trucks, and the others are picked up closer to the job sites. He testified that all of the employees might come once or twice a year, for example to clean up for the winter, but even that might not be necessary.

B. People's Counsel

The People's Counsel participated in questioning the witnesses. He also offered a closing statement in which he applauded the Romeros for their hard work over many years in a country with a different language from their native tongue, and for setting an example through their honorable conduct in seeking this special exception.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards, both specific and general, are met. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Based on the testimony and evidence of record, I conclude that the proposed landscape contractor special exception would satisfy all of the specific and general requirements for the use.

A. Inherent and Non-inherent Adverse Effects

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site." *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a landscape contractor. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, as well as adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-

inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following may be considered inherent characteristics of a landscape contractor use: structures or outdoor areas for the storage of plants grown off-site; outdoor storage of mulch, soil and other landscaping materials, in bulk or in containers; on-site storage of business vehicles and equipment including small trucks and landscaping trailers; traffic associated with trips to the site by employees and suppliers; trips to and from the site by employees engaged in off-site landscaping activities; parking for employees; dust and noise associated with the movement of nursery and landscaping products and the loading and unloading of landscaping equipment; noise associated with the occasional testing of lawn mowers, snow blowers and other landscaping equipment; and early hours of operation.

Technical Staff did not make a specific finding as to whether any non-inherent adverse effects are present in this case. Staff concluded, however, that none of the physical or operational characteristics of the use proposed here would have adverse effects on the neighborhood.

The Hearing Examiner finds, based on the totality of the evidence presented in this case, that all of the characteristics of the proposed use should be considered inherent characteristics. The physical characteristics are all inherent in the use – the barns, parking areas and outdoor storage areas are all typical of landscape contractors. The basic operations of the business, including the arrivals and departures of employees and loading and unloading activities, are typical of landscaping contractors. Not all landscape contractors being operating as early as 6:30 a.m., but given the agricultural character of the general neighborhood, the noise and activity generated at the subject property are unlikely to have any significant adverse effect. Trips from the subject property to job sites and back are generally an inherent operational characteristic of landscape contractors, as are deliveries from suppliers. With the limits stated in the recommended conditions of approval, the operational characteristics of the landscape contractor use at this site are consistent with those inherent in the use. Moreover, there are no unusual site characteristics. Accordingly, the Hearing Examiner concludes that the proposed use has no inherent or non-inherent adverse effects sufficient to warrant denial.

B. Specific Standards

The specific standards for a landscape contractor are found in Code § 59-G-2.30.00. The Technical Staff report, written evidence and testimony provide sufficient evidence that the proposed landscape contractor use would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.30.00 Landscape Contractor.

This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a wholesale or retail horticultural nursery, or a mulch/compost manufacturing operation. If a combination of these uses is proposed, the Board opinion must specify which combination of uses is approved for the specified location.

Conclusion: The evidence supports the conclusion that the adverse effects of the proposed use would not rise to the level of a nuisance.

- (1) The minimum area of the lot must be 2 acres if there are any on-site operations, including the parking or loading of trucks or equipment.

Conclusion: The lot size is approximately 2.3 acres.

- (2) Areas for parking and loading of trucks and equipment as well as other on site operations must be located a minimum of 50 feet from any property line. Adequate screening and buffering to protect adjoining uses from noise, dust, odors, and other objectionable effects of operations must be provide for such areas.

Conclusion: The site plan, Ex. 21, shows that parking and loading areas for trucks and equipment, as well as other on-site operations for the landscape contractor use, are located more than 50 feet from all property lines. The storage and loading of vehicles, equipment and materials would take place in a portion of the site that is screened by a solid wood fence, buildings and mature vegetation on three sides, with the open side facing a large agricultural field. Moreover, the nearest house is approximately 115 feet from the major special exception activity area, on the other side of an opaque fence and evergreen landscaping. The six-space employee parking area is located approximately 160 feet from the closest house, and is separated from it by a grassy area, an opaque fence and an eight-foot hedge. The evidence supports the conclusion that distance and landscaping would be adequate to protect adjoining uses from noise, dust, odors and other objectionable effects of these operations, given that some amount of noise, dust and odors is inherent in the use.

- (3) The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on site must be limited by the Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.

Conclusion: The recommended conditions limit the number of vehicles and trailers permitted on site. The site plan and the opinion of Technical Staff support the conclusion that the area designated for truck and trailer parking is adequate to accommodate the number of vehicles proposed in the recommended conditions. Moreover, testimony indicated that on many occasions business vehicles are parked inside the large barns. Adequate parking also is provided for employees, provided that if the number of employees on site reaches the maximum of eight, at least two of the employees must carpool with others. Based on the Petitioners' experience to date with their employees, that is a very reasonable expectation. The evidence further supports the conclusion that the site entrances and driveways are adequate to accommodate the amount and type of vehicular activity proposed. Accordingly, the Hearing Examiner concludes that this condition is satisfied.

- (4) No sale of plant materials or garden supplies or equipment is permitted unless the contracting business is operated in conjunction with a retail or wholesale nursery or greenhouse.

Conclusion: No sales of any kind are proposed.

- (5) The Board may regulate hours of operation and other on-site operations so as to prevent adverse impact on adjoining uses.

Conclusion: The recommended conditions restrict hours of operation and delivery times.

- (6) In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessarily need to be controlled as stringently as the impact of a special exception in the residential zones.

Conclusion: The Hearing Examiner has taken this admonition into account in weighing the evidence and making a recommendation of approval, but she accords it limited weight in this context. Unless a landscape contractor operation is associated with a nursery, it does not fall within either the definition of “agriculture” in the Zoning Ordinance or the general meaning of agricultural activity as an activity involving the cultivation of plants. A landscape contractor use may be considered an “agricultural special exception” in a general sense because it deals with plants and is generally compatible with a rural setting, but it should not be considered an agricultural activity.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). Based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed use would be consistent with these standards, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: A landscape contractor is a permitted use in the RDT Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with each of the standards and requirements set forth for the use in Code §59-G-2.30.00, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception

concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The Hearing Examiner accepts Technical Staff's conclusion that the proposed special exception would be consistent with the *Preservation of Agriculture and Rural Open Space Master Plan*.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The Hearing Examiner is in agreement with Technical Staff's conclusion that the proposed special exception would be in harmony with the general character of the neighborhood. The structures used for the landscape contractor operation are typical for a rural, agricultural neighborhood. The intensity of activity on the site would be limited, given that most of the activity would occur during brief periods in the morning and late afternoon. With the proposed conditions, deliveries would take place during standard working hours, and would not take place on weekends. On-site parking would be adequate for the number and type of vehicles proposed in the recommended conditions of approval, provided that the Petitioners comply with the condition limiting the number of employees driving to the site to six at any one time. The amount of traffic generated by employee arrivals and departures would be very small and would have no discernible impact on traffic conditions. The amount of truck traffic generated by trips to and from job sites would be limited by the restriction on the number of trucks. No evidence was presented to counter Technical Staff's conclusion that traffic generated by the proposed use would not have an adverse impact on area roads.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that due to the limited periods of intense activity and substantial buffering by distance, fencing and vegetation, the proposed special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust,

illumination, glare, or physical activity at the subject site. The exterior lighting consists of residential fixtures at a substantial distance from the nearest residences, with no anticipated off-site impacts. The noise and odors that may be expected are consistent with the inherent characteristics of a landscape contractor use and should not be considered objectionable in this context.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Not applicable; the general neighborhood of the subject property is rural/agricultural in character, rather than single-family residential.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed special exception would not adversely affect the general welfare of residents, visitors and workers in the area of the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the exception of sanitary sewer, which is not provided, and that the septic system is adequate for the residential use and for limited use by employees of the landscape contractor operation.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: The proposed special exception would not require subdivision approval. Because it would generate fewer than 30 vehicle trips during the

weekday morning and evening peak hours, no study is required to comply with Local Area Transportation Review. As the Board of Appeals is aware, Policy Area Transportation Review has been eliminated from the Annual Growth Policy.

- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence supports a finding that the proposed use would have no detrimental effect on the safety of vehicular traffic. There is no evidence to suggest any detrimental effect on pedestrian traffic, particularly because there are no sidewalks on Sugarland Road and therefore no specific provisions for pedestrian traffic.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.
- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: As discussed above, the Petitioners have met their burdens of proof and persuasion in this case.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2605, which requests a special exception under the RDT Zone to operate a landscape contractor business on property located at 14680 Sugarland Road in Poolesville, Maryland, be **granted** with the following conditions:

- 11. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witness and representations of counsel identified in this report, including the final Special Exception Site Plan, Exhibit 21.
- 12. The hours of operation for the landscape contractor business shall be from 6:30 a.m. to 7:30 p.m. Monday through Friday and 7:30 a.m. to 2:00 p.m. on Saturdays. Expanded hours are permitted as needed in the event of a weather emergency such as a large snowfall or a hurricane.
- 13. No sale of goods of any kind may take place on the subject property.
- 14. The landscape contractor business is limited to eight employees on site at any one time, in addition to the Petitioner, except that up to 12 employees may be on site at one time for special clean-up or winter preparation activities, for no more than a total of four full or partial days per year. No more than six employee vehicles may be parked on site at any one time, and all must be parked in the area designated on the site plan for employee parking.

15. Vehicles, trailers and heavy equipment stored on the subject property in connection with the landscape contractor business shall be limited to a total of 12 registered vehicles, comprised of trucks and landscaping trailers, plus one tractor-loader or skid-steer loader and the Petitioners' personal pick-up truck. No more than eight of the registered vehicles may be trucks, and trucks may not exceed a gross vehicle weight of 10,000 pounds.
16. All business vehicles shall be parked in the area designated on the site plan, or stored inside one of the barns.
17. No signage is permitted.
18. Activities taking place on site must be limited to those described in the Petitioners' testimony and written evidence, consisting primarily of employees loading equipment and materials on trucks in the morning and unloading them in the late afternoon. Activities taking place between those times must be limited to accepting deliveries and other minor, incidental activities related to the landscape contractor business.
19. The landscape contractor business may receive no more than three deliveries per week. Deliveries to the subject property in connection with the special exception shall take place only between the hours of 8:00 a.m. and 6:00 p.m., Monday through Friday. No deliveries shall take place on Saturdays or Sundays. Delivery of bulk landscaping materials may not be received unless and until appropriate bins are constructed in the area designated for plant and bulk material storage on the site plan, Exhibit 21.

Dated: September 28, 2004

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner